IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC11-1135

v.

TFB File No. 2007-50,202(09C)

MAX RICARDO WHITNEY,

Respondent.
_____/

INITIAL BRIEF

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending a ninety day suspension without proof of rehabilitation prior to reinstatement and payment of $14,887.62 of the bar's total $18,058.43 in costs.

Complainant will be referred to as The Florida Bar, or as the bar. Max Ricardo Whitney, respondent, will be referred to as respondent throughout this brief.

References to the Report of Referee shall be by the symbol ROR followed by the appropriate page number.

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol T, followed by the volume, followed by the appropriate page number (e.g., T. Vol. III, p. 289).

References to bar exhibits shall be by the symbol B-Ex. followed by the appropriate exhibit number (e.g., B-Ex. 10). References to respondent's exhibits shall be by the symbol R-Ex. followed by the appropriate exhibit number (e.g., R-Ex. 10).

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "C" voted to find probable cause in this matter on May 25, 2010. The bar served its Complaint on June 8, 2011. The referee was appointed on June 16, 2011. On August 5, 2011, the bar moved this Court for an extension of time to February 6, 2012 for the referee to file his report in this matter because the final hearing was scheduled for December 6-8, 2011. On August 23, 2011, this Court granted the bar's motion and permitted the referee to February 6, 2012, to file his report. On November 29, 2011, respondent moved this Court for a second extension of time for the referee to file his report to permit respondent additional time to locate a witness in Brazil. Respondent sought an extension until March 31, 2012. On December 7, 2011, this Court entered its order granting the referee to April 2, 2012 to file his report. On March 7, 2012, the bar moved this Court for a third extension of time after respondent obtained two continuances of the final hearing from the referee, one on February 24, 2012 and another on March 5, 2012, due to illness. The bar sought an extension of time until May 21, 2012. On March 19, 2012, the Court granted the extension of time until May 21, 2012. On May 2, 2012, the bar served a fourth motion for extension of time after the referee re-scheduled the final hearing due to a calendar conflict. The bar sought an extension to July 13, 2012. On May 7, 2012, the Court granted the referee

until July 13, 2012 to file his report. The final hearing was held on June 12, 13 and 14, 2012. The bar filed its Statement of Costs and Request for Payment of Disciplinary Costs on June 28, 2012. On July 3, 2012, the bar filed its Amended Statement of Costs to which respondent filed his objection on July 5, 2012. The bar filed a Second Amended Statement of Costs on July 10, 2012 and filed its Response to Respondent's Objection to Costs on July 11, 2012.

On July 5, 2012, the bar filed a fifth motion for extension of time to July 30, 2012 due to the referee's preplanned and prepaid vacation out of the country. On July 13, 2012, the court granted the referee until July 30, 2012 to file his report. The referee filed his report on July 25, 2012 wherein he recommended respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.3, 4-1.4(a), 4-1.4(b), 4-1.16(d), 4-3.3(a), 4-3.4(a), 4-3.4(b), 4-3.4(c), 4-3.4(d), and 4-8.4(d). Although not specifically stated, the referee did not find respondent guilty of violating rules 3-4.3, 4-1.1, and 4-8.4(c).

The Executive Committee of The Florida Bar Board of Governors considered the Report of Referee on August 20, 2012 and voted to seek review of his recommendation of a ninety day suspension and payment of only a portion of the bar's costs and to seek a one year suspension and payment of all the bar's costs. The

bar filed its Notice of Intent to Seek Review of Report of Referee on September 5, 2012.

STATEMENT OF THE FACTS

Michael Hill, M. D., and his girlfriend, Leila de Oliveira, hired respondent in early 2004 to provide them with immigration and legal advice (ROR p. 3). The couple met with respondent on January 19, 2004 to discuss Ms. de Oliveira's immigration status and the parties' intention to be married (ROR p. 3). Ms. de Oliveira advised respondent she was in this country illegally for the third time in violation of a document she received from the U. S. Department of Justice banning her from re-entry for twenty years (ROR p. 3). Dr. Hill advised respondent that, although he intended to marry Ms. de Oliveira, they were not yet engaged and he had known her only since November 2003 when she began cohabitating with him in his home in Lake County, Florida (ROR p. 3). Respondent had Dr. Hill, not Ms. de Oliveira, execute a fee agreement providing for a flat fee of $15,000.00 plus a $5,000.00 cost deposit (ROR p. 3). Respondent's fee agreement named Dr. Hill as the client (ROR p. 3; B-Ex. 1 Tab 47). Thereafter, Dr. Hill paid respondent by two checks totaling $19,365.00 (ROR p. 4), with the balance of $635.00 being satisfied by Dr. Hill directly purchasing one airline ticket for respondent's trip to Brazil (ROR p. 5). Respondent deposited all the funds he received from Dr. Hill, including those intended as a cost deposit, to his personal checking account, rather than to a trust account, and used the cost money to pay his personal bills (ROR pp. 4, 6). Respondent failed to provide an accounting to

Dr. Hill for the costs he expended despite requests that he do so (ROR p. 4). During the ensuing civil suit brought against him by Dr. Hill, respondent was unable to account for $2,148.00 in cost money that he improperly kept and used because he needed money (ROR p. 4).

During the time he represented Dr. Hill and Ms. de Oliveira, respondent failed to keep them reasonably informed about the status of the immigration matter and failed to sufficiently explain to them the legal obstacles that needed to be overcome in order for Ms. de Oliveira to become a legal citizen and marry Dr. Hill (ROR pp. 4-5). Respondent knew, or reasonably should have known, Ms. de Oliveira's particular situation presented a difficult legal problem to overcome. Despite the fact he assured them at the time he was hired that he was going to research how best to resolve the dilemma with Ms. de Oliveira remaining in the U. S., he failed to diligently pursue a solution to Ms. de Oliveira's legal problem and failed to keep his clients informed as to his progress (ROR pp. 5, 6). Other than two trips to Brazil, where he obtained information he could have found without leaving the U. S., respondent took no meaningful action with respect to Ms. de Oliveira's immigration matter (ROR p. 7). After having no communication from respondent since hiring him in January 2004, Dr. Hill contacted respondent in either late 2004 or early 2005 for a status update (ROR p. 7). Respondent admitted he had not initiated the process for Ms. de Oliveira to remain

in the U. S. legally or to re-enter the U. S. legally so they could be married in the U. S. (ROR p. 8). Respondent advised Dr. Hill they should marry in Brazil and that respondent had traveled there, twice, to obtain the necessary documents for them (ROR p. 8). Respondent then advised Dr. Hill he would proceed further with the matter only after Dr. Hill paid him an additional fee of between $40,000.00 and $60,000.00 (ROR p. 8). Dr. Hill terminated respondent's services and demanded a full refund of the fees and costs he had paid to respondent (ROR p. 8). Respondent refused and Dr. Hill retained attorney Bonnie Jackson. On July 18, 2005, Dr. Hill filed suit against respondent for breach of contract, legal malpractice and unjust enrichment (ROR p. 9). Ms. de Oliveira returned to Brazil in April 2005 (ROR p. 9).

During the course of the civil litigation, respondent engaged in a course of conduct where he was uncooperative in coordinating the scheduling of hearings and willfully failed to produce documents pursuant to discovery requests and failed to provide supplemental answers to interrogatories (ROR pp. 10-11). On December 12, 2005, the court ordered respondent to comply with Dr. Hill's discovery requests but he failed to do so (ROR p. 11). He also failed to appear for his duly noticed deposition and did not either advise opposing counsel of his inability to appear on the scheduled date or file a notice of unavailability (ROR p. 11). As a result, opposing counsel filed a second motion to compel and a motion for sanctions, resulting in the court

admonishing respondent to cooperate fully with discovery (ROR p. 11). Despite this warning, respondent continued to frustrate Dr. Hill's discovery efforts (ROR p. 12). He not only produced documents long past the required production date, he failed to produce all the requested documents, a fact opposing counsel discovered only when respondent appeared at his deposition with a client file containing documents not previously produced pursuant to her request for production (ROR p. 12). Additionally, he had advised opposing counsel during her pre-suit investigation that he no longer had a client file for either Dr. Hill or Ms. de Oliveira or any documents pertaining to them. He appeared, however, at his deposition with the aforementioned client file containing such documents (ROR p. 13). He produced redacted documents without asserting an objection or otherwise indicating he had made a redaction (ROR p. 12). Respondent failed to produce his charge card account statements and/or receipts that were sought through discovery in order to document the expenditures he allegedly incurred in Brazil in connection with his representation of Dr. Hill and Ms. de Oliveira (ROR p. 13). He falsely stated in response to Dr. Hill's production request concerning advertising that he did not engage in advertising (ROR p. 13). Opposing counsel discovered respondent's Internet website only through her own efforts (ROR p. 13). Additionally, during his sworn deposition, respondent failed to disclose all of the various entities under which he had practiced law (ROR p. 14). Respondent made

misrepresentations while testifying under oath during his deposition in response to questions intended to discover whether he was experiencing financial difficulties during the time period he was hired by Dr. Hill and Ms. de Oliveira (ROR p. 15). He falsely testified that the mortgage on his home had not been in foreclosure during the relevant time period when in fact a foreclosure action had been filed against him on November 1, 2004 and still was pending at the time of his deposition in January 2006 (ROR p. 16). Respondent's failure to reveal the existence of this suit was particularly relevant to Dr. Hill's claim in light of respondent's further testimony during his deposition that he deposited the funds he received from Dr. Hill to his personal checking account and used all of the money to pay, among other things, the mortgage on his home (ROR p. 16). Respondent also asserted frivolous objections to discovery on the basis of attorney/client privilege and withheld documents despite the fact the documents had originated from Dr. Hill or were public record (ROR p. 16).

On March 31, 2006, opposing counsel served a motion for sanctions and a motion for entry of a default judgment against respondent as a result of his ongoing refusal to substantially comply with discovery requests (ROR p. 16). On May 30, 2006, the court granted opposing counsel's motion, struck respondent's defenses, and entered a default against him. The court found that respondent willfully failed and refused to comply with the court's previous order regarding discovery, failed and refused to

participate in pretrial discovery, and provided false documents in the case (ROR p. 17). On October 4, 2007, the court entered a final judgment in the amount of $62,321.00 in favor of Dr. Hill, of which respondent immediately paid $20,000.00 (ROR p. 17). The issue of the attorney's fees component of the judgment was appealed and on June 15, 2011, Dr. Hill was awarded $24,246.00 in attorney's fees, expert witness fees and costs, none of which respondent has paid to date (ROR p. 17).

SUMMARY OF ARGUMENT

The referee found respondent guilty of making a false statement of material fact, fabricating evidence, and misusing cost monies for personal purposes. Such acts of misconduct are serious violations of the Rules Regulating The Florida Bar and warrant the imposition of a one year suspension with proof of rehabilitation prior to reinstatement rather than a ninety day suspension without proof of rehabilitation. In light of the aggravating factors present in this case, including respondent's selfish and dishonest acts along with the vulnerability of the victim who was here illegally, a rehabilitative suspension is justified. Respondent accepted a large sum of money, at a time when he was facing serious financial problems. He provided no meaningful legal services and engaged in minimal communication with his clients. Thereafter, he refused to refund the money and compounded his misconduct when his client sued him for malpractice by refusing to comply with discovery. Respondent was not an inexperienced practitioner. His ongoing pattern of refusing to cooperate with opposing counsel in scheduling hearings and depositions, his refusal to fully comply with discovery and his general obstruction of the orderly processing of the civil suit finally resulted in the trial court sanctioning him by striking his pleadings and entering a default against him. To date, respondent has not paid the attorney's fees and costs

assessed against him. Respondent's pattern of misconduct demonstrates a disregard for his clients and for the judicial process.

The Rules Regulating The Florida Bar and case law support the award of costs in favor of the bar where the bar prevails either in full or in part. While it is clear the costs must be reasonable, it is an abuse of discretion for a referee to fail to award costs when the bar prevails and the costs incurred are reasonable. The bar provided respondent with a statement of its costs, and an amended statement of costs, clearly setting forth the bar's costs. The Rules Regulating The Florida Bar permit the taxation of witness costs and investigator costs. In its response to respondent's objection to the expert witness costs and investigator costs, the bar clearly demonstrated that these costs were reasonable and were necessarily incurred. The referee's report is devoid of any discussion concerning the referee's reasons for not taxing these costs against respondent, despite the fact the referee found respondent engaged in misconduct warranting the imposition of disciplinary sanctions. Requiring the membership of the bar, rather than respondent, to bear this portion of the disciplinary costs would be an abuse of discretion and contrary to this Court's long standing policy of requiring the attorney found guilty of professional misconduct to bear the costs associated with the disciplinary proceedings against him or her.

ARGUMENT

ISSUE I

A 1 YEAR SUSPENSION IS THE APPROPRIATE LEVEL OF DISCIPLINE GIVEN THE REFEREE'S FINDING THAT RESPONDENT MADE MISREPRESENTATIONS TO THE TRIAL COURT AND TO OPPOSING COUNSEL WHILE DEFENDING THE MALPRACTICE SUIT BROUGHT AGAINST HIM BY THE CLIENT AND THAT HE MISUSED COST MONEY

The referee found respondent guilty of several serious rule violations: 4-3.3(a) for making a false statement of material fact, 4-3.4(b) for fabricating evidence with respect to his providing false documents in response to discovery requests during Dr. Hill's malpractice suit and 4-8.4(d) for engaging in conduct prejudicial to the administration of justice (ROR p. 11). Equally as serious was respondent's misuse of Dr. Hill's cost deposit to pay personal bills (ROR p. 6). Such serious acts of misconduct, in light of the aggravating factors present in this case, warrant the imposition of a suspension of one year with proof of rehabilitation prior to reinstatement rather than the referee's recommended ninety day suspension without proof of rehabilitation.

The standard for review of a referee's recommendation as to discipline is broader than that afforded to the factual findings because this Court has the ultimate responsibility for imposing the appropriate sanction. The Florida Bar v. Winters, 37 Fla. L. Weekly S545 (Fla. Sept. 6, 2012). In general, however, this Court does not

disturb a referee's recommendation as to discipline if it has a reasonable basis in case law and the Florida Standards for Imposing Lawyer Sanctions. Winters, 37 Fla. L. Weekly S545. The discipline recommended by the referee, a 90 day suspension and payment of a portion of the bar's costs, is not, however, supported by the existing case law or the Florida Standards for Imposing Lawyer Sanctions. When choosing to increase discipline recommended by a referee, this Court has stated that "if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it." The Florida Bar v. Wilson, 425 So. 2d 2, 4 (Fla. 1983). The discipline recommended by the referee in this case does not measure up to the gravity of respondent's misconduct and, based upon the case law and applicable standards, should be increased to a rehabilitative suspension. Respondent's intentional self-serving misrepresentations to the court and opposing counsel during the civil suit interfered with the orderly administration of justice and warrant the imposition of a suspension requiring proof of rehabilitation.

When an attorney's misconduct demonstrates a "flagrant disregard for the judicial process," a suspension requiring proof of rehabilitation is warranted. The Florida Bar v. Bloom, 632 So. 2d 1016, 1017 (Fla. 1994). The referee herein found that, during the malpractice suit brought against him by Dr. Hill, respondent willfully failed to substantially comply with pretrial discovery and provided falsified documents

in response to discovery requests (ROR p. 11). Respondent failed to serve responses to Dr. Hill's September 20, 2005, request for production within the time frame mandated by the Florida Rules of Civil Procedure (ROR p. 12). His lack of compliance necessitated opposing counsel filing a motion to compel and the trial court having a hearing and issuing an order dated December 12, 2005, compelling production (ROR p. 11). Respondent's misconduct resulted in the wasting of court resources and increased Dr. Hill's litigation costs. Despite the court's December 12, 2005 order compelling production on or before December 19, 2005, respondent failed to comply within the allotted time (ROR p. 11). Respondent argued he could not comply because he was out of the country and ill upon his return. He, however, had no plausible explanation for his initial and complete failure to comply with the discovery, or to seek a reasonable extension of time in which to comply, for the month and one-half leading up to the hearing on Dr. Hill's motion to compel.

The referee further found that opposing counsel had to file a second motion to compel in the case after respondent refused to appear for his duly noticed deposition (ROR p. 11). At the hearing on this second motion to compel, the trial court admonished respondent and advised him to fully cooperate with discovery (ROR p. 11). Respondent disregarded this warning and continued to frustrate Dr. Hill's discovery efforts (ROR p. 12). Despite the court's order directing him to produce his

credit card account statements and/or receipts needed to substantiate the cost expenditures on behalf of Dr. Hill and Ms. de Oliveira during his two trips to Brazil, respondent refused to produce said documents (ROR p. 13; T Vol. I p. 92). As an excuse for his failure to provide the statements and/or receipts, respondent claimed that his accountant had them. He told opposing counsel that he had been unable to locate them at his accountant's office the very morning of his deposition. He was also unable to provide counsel with sufficient information for her to determine the accountant's name and address for a subpoena (T Vol. I pp. 43-45). Even more indicative of respondent's true motive was his failure to make any effort to obtain the monthly credit card statements directly from the credit card company.

Of more significance than the late filing of the discovery responses was respondent's actual production of documents. First, the documents he produced were incomplete. Ms. Jackson, opposing counsel, discovered respondent's deception, by happenstance, when respondent brought his client file containing documents not previously produced, but that were covered by the production request, to his deposition (ROR p. 12). Second, respondent produced two documents that he had redacted without taking any steps to put Ms. Jackson on notice as to the redactions (ROR p. 12; T Vol. I pp. 56-59). She learned of the redactions only after she happened to notice the originals of these documents in respondent's client file at his deposition (ROR p. 12; T

Vol. I pp. 57-59). Interestingly, neither document pertained to Ms. de Oliveira's case. More importantly, respondent deliberately failed to notify Ms. Jackson of that fact when he produced the redacted documents (T Vol. I pp. 57-59). Respondent's misconduct began prior to the filing of the negligence lawsuit. During her pre-suit investigation, Ms. Jackson contacted respondent and requested the client file. Respondent claimed that the client file no longer existed or that it no longer was in his possession, custody or control (ROR p. 13). Respondent knew this was a blatant misrepresentation at the time he made it and it was only revealed to opposing counsel at respondent's deposition.

Respondent's acts of concealing material documents from opposing counsel is, by its very nature, considered to be evidence of intentional deception. The Florida Bar v. Nicknick, 963 So. 2d 219 (Fla. 2007). Respondent's actions thwarted the purposes of R. regulating Fla. Bar 4-3.4(a) of securing fair competition in the adversarial system. "Fair competition is secured by ensuring a party's right to obtain relevant evidence is not frustrated by the concealment of such evidence." Nicknick, 963 So. 2d at 223. Respondent's actions in withholding information that the documents did not pertain to Ms. de Oliveira and redacting the documents without informing opposing counsel of their redaction effectively represented to Ms. Jackson that the documents were pristine and that they related to Ms. de Oliveira. The referee found that "respondent's failure to

timely and properly respond to discovery and then to compound his failure to do so by providing deceptive, misleading, and/or false documents and/or testimony is inexcusable. Respondent is an officer of the court and as such, the obvious stall tactics he engaged in during discovery and his pervasive and flagrant disregard for the judicial process represents serious attorney misconduct" (ROR pp. 33-34). Respondent clearly breached the confidence reposed in him as an officer of the court.

Respondent's propensity for making misrepresentations under oath is further demonstrated by his response to a simple production request for documents reflecting promotions, advertising, announcements, websites, banners, flyers, brochures, business cards and the like in connection with the practice of law. Respondent asserted he did not advertise. In fact, respondent had a current website on the Internet which opposing counsel discovered through her own efforts (ROR p. 13). Respondent also made misrepresentations, under oath, during his deposition in the civil case, concerning his various business entities, and the nature of his financial problems during the time he was representing Dr. Hill and Ms. de Oliveira (ROR pp. 13-15). Ms. Jackson learned the correct information only through her own efforts (ROR p. 13; T Vol. I pp. 60, 61-63, 74). The referee found respondent's actions constituted serious misconduct (ROR p. 34).

Respondent's misconduct in this matter not only failed to maintain the high

ethical standards to which all attorneys must adhere but also damaged the integrity of the legal profession and should be taken most seriously. The conditional privilege to practice law is encumbered by an attorney's obligation to uphold the high ethical standards of the legal profession. "Lawyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities" [see The Florida Bar v. Levine, 498 So. 2d 941, 942 (Fla. 1986)]; conditions [see The Florida Bar v. Massfeller, 170 So. 2d 834, 839 (Fla. 1964)]; and special burdens [see State v. Fishkind, 107 So. 2d 131, 132 (Fla. 1958)]. The Supreme Court of Florida has long held that "[i]t is essential to the well-being of the profession that every lawyer square his personal and professional conduct by the precepts of the Code of Ethics." Dodd v. The Florida Bar, 118 So. 2d 17, 21 (Fla. 1960).

This Court has found that the typical sanction for intentionally lying to the court is disbarment because an "officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process." The Florida Bar v. St. Louis, 967 So. 2d 108, 122-123 (Fla. 2007). In The Florida Bar v. Dove, 985 So. 2d 1001 (Fla. 2008), this Court indicated it would have disbarred Ms. Dove had it not been for the mitigation in her case, which included evidence of rehabilitation, lack of a prior disciplinary history, and substantial contributions to the legal community in the area of

adoption law. Ms. Dove was suspended for three years for knowingly making material misrepresentations to the court in termination of parental rights and adoption matters and for willfully withholding material information from the court. Her actions caused significant adverse effects on the legal proceedings and the interested parties. Ms. Dove filed a petition for custody in an adoption case wherein she falsely stated the legal father, by affidavit, had surrendered his parental rights. Ms. Dove did not file an affidavit from the putative father that would allow the termination of his parental rights. Ms. Dove also misrepresented to the court in a notice that she had filed a petition to terminate parental rights pending adoption that was served on the biological parents. Relying on the truthfulness of the statements Ms. Dove made in her filings, the court entered an order terminating the parental rights.

This Court has dealt seriously with attorneys who have demonstrated an egregious disregard for the judicial process. In The Florida Bar v. Miller, 863 So. 2d 231 (Fla. 2003), an attorney was suspended for one year for deliberately concealing material information in an employment discrimination case. Mr. Miller was hired to represent a client in an employment discrimination and sexual harassment case. The EEOC sent via certified mail an undated right to sue notice addressed to the client at her mother's address. The client's mother signed the return receipt card and the client faxed the letter to Mr. Miller after she received it from her mother. The EEOC sent a

second right to sue notice containing the date two months after the first one was mailed. Mr. Miller neglected to file the suit within the time frame computed from the date the first right to sue notice was received. Using the time frame computed from the date of the second notice, however, the action was timely. Mr. Miller deliberately concealed that he was aware of the first notice and permitted witnesses to testify during their depositions in a way that created an impression that neither Miller nor his client were aware of the first notice and they filed affidavits to this effect. The record showed that Mr. Miller engaged in an intentional prolonged pattern of deceit, in part to cover his failure to timely file the action. The trial court issued an order imposing sanctions on Mr. Miller for "concealing critical evidence, advancing spurious arguments and submitting misleading affidavits and testimony." Miller, 863 So. 2d at 233.

Similarly, the trial court in the malpractice litigation found that respondent had willfully failed and refused to comply with previous order of the court, failed and refused to participate in pretrial discovery and provided falsified documents. (B-Ex. 1 Tab 41). The trial court sanctioned respondent by striking respondent's defenses and awarded attorneys fees to opposing counsel (ROR p. 33). Respondent engaged in a pattern of deceit in the malpractice case, in part to conceal his failure to provide Dr. Hill and Ms. de Oliveira with any meaningful legal services, and to conceal his misuse of Dr. Hill's funds. Respondent concealed relevant documents from Ms. Jackson

during discovery. In mitigation, respondent, like Mr. Miller, had no prior disciplinary history. Both were sanctioned by the trial court for their misconduct.

An attorney was suspended for one year in The Florida Bar v. Broome, 932 So. 2d 1036 (Fla. 2006) for engaging in multiple acts of misconduct over a seven year period. Ms. Broome repeatedly neglected legal matters, failed to maintain adequate communication with clients, failed to comply with orders to show cause issued in a client's criminal case, failed to respond to the bar's investigative inquiries, failed to pay a judgment entered against her by a client for legal fees despite repeatedly leading the client and the bar to believe she would satisfy the judgment in the near future, charged an excessive fee in a criminal case, and failed to provide clients with competent representation in criminal cases. In aggravation, Ms. Broome was experienced in the practice of law. Although her documented depression did act to somewhat mitigate this factor, there were multiple instances of misconduct, including violations of rule 4-3.4(c) which this Court stated had warranted imposition of a suspension in previous cases, and there was client harm in at least one instance. In mitigation, this Court recognized that her financial difficulties prevented her from satisfying the judgment entered against her by her former client and her depression factored into her failure to respond to the bar.

Respondent also violated rule 4-3.4(c) and caused client harm by neglecting Ms. de Oliveira's case. He failed to maintain adequate communication with Ms. de Oliveira and Dr. Hill, and refused to either account for or refund the cost monies. Respondent, like Ms. Broome, failed to comply with court orders and was experienced in the practice of law.

This Court imposed a ninety-one day suspension with proof of rehabilitation prior to reinstatement in The Florida Bar v Batista, 846 So. 2d 479 (Fla. 2003) where an attorney failed to provide several different clients with competent and diligent representation and failed to maintain adequate communication with them. In the first case, Mr. Batista represented a client in a claim for Social Security benefits for her minor child. After being paid a substantial fee, he did nothing more than meet with the client twice and speak with her on the telephone six times. In the second case, Mr. Batista was hired by a father and daughter for two separate legal matters. The daughter wanted to obtain permanent residency and a work permit and the father wanted his driver's license reinstated. The referee found that Mr. Batista failed to take any significant action in the daughter's case. The referee found that, while the daughter was partly at fault for failing to execute required documents, it did not excuse Mr. Batista's lack of diligence because the attorney the daughter hired after firing Mr. Batista was able to secure the work permit. The gravamen of the complaint was not that the desired

result was not obtained but that the attorney failed to timely recognize and communicate to his client that such a result could not be obtained. In the father's case, Mr. Batista led the father to believe his driver's license could easily be reinstated even though it had been permanently revoked. Mr. Batista eventually learned reinstatement of the license was not possible. The father obtained a default judgment against Mr. Batista for the fee paid. Mr. Batista did not satisfy the judgment.

Similar to Mr. Batista, respondent led Dr. Hill and Ms. de Oliveira to believe he could provide them with legal services then, after being paid a fee, did little or no meaningful work. Further, respondent, like Mr. Batista, should have known or found out within a reasonable time that he could not provide them with the relief they sought or could not do so within a reasonable time and he should have informed Dr. Hill and Ms. de Oliveira without delay. Unlike Mr. Batista, however, respondent also misused client funds. He further compounded his misconduct by engaging in dishonesty during his defense of the malpractice action brought against him. Respondent's cumulative acts of misconduct were far more serious than Mr. Batista's misconduct.

Respondent's conduct is somewhat similar to that of the attorney in Bloom, 632 So. 2d 1016. Mr. Bloom failed to timely respond to discovery requests in a civil suit brought against him, despite being ordered by the trial court to comply. He also failed to attend hearings in the case and failed to pay costs assessed against him as a sanction

for failing to comply with discovery. The trial court issued an order to show cause to which Mr. Bloom failed to file a response. As a result, his pleadings were struck as a sanction and a default judgment was entered against him. Mr. Bloom continued to frustrate the judicial process during the proceedings in aid of execution. He failed to comply with discovery requests and failed to appear for his deposition, resulting in the trial court finding him to be in indirect criminal contempt of court and issuing a writ of attachment against his property.

Respondent's behavior was even more egregious than that of Mr. Bloom, because respondent also engaged in misrepresentation. Had Mr. Boom done so, presumably the suspension would have been imposed for a longer period than ninety-one days. Also unlike respondent, Mr. Bloom had a prior disciplinary history.

Further, respondent's violation of his ethical obligations was more extensive than Mr. Bloom as respondent also misused his client's cost deposit. In his January 27, 2006 deposition in the civil case, respondent admitted that he deposited both of Dr. Hill's cost deposit checks to his personal checking account. He acknowledged that he was experiencing financial problems at the time (B-Ex. 1 Tab 62 p. 191) and he needed the money to pay bills, including his mortgage, car payments, daily living expenses, college tuition for his daughter, insurance, etc. (B-Ex. 1 Tab 62 pp. 188-193). Respondent, however, during these disciplinary proceedings, testified that his financial

difficulties had no relationship to monies Dr. Hill paid him in February 2004 (T Vol. IV p. 588). He also took the position that he deposited the cost monies to his personal checking account, rather than to his trust account, because he already had incurred the costs and was merely reimbursing himself for money he had advanced in connection with the two trips to Brazil (T. Vol. V pp. 615-616). The evidence clearly demonstrated that, at the time respondent deposited said funds into his personal account, he had not incurred sufficient expenditures on behalf of his clients such that he reasonably could have believed these monies were his personal property. Dr. Hill paid respondent $10,000.00 on January 6, 2004, shortly after their initial consultation and the fee contract was executed (B-Ex. 1 Tab 48). Respondent's first trip to Brazil did not occur until January 31, 2004 (B-Ex. 1 Tab 19 p. 4). Dr. Hill paid respondent $9,365.00 on February 6, 2004 (B-Ex. 1 Tab 48). Respondent made his second trip to Brazil in March 2004 (B-Ex. 1 Tab 19 p. 4; B-Ex. 1 Tab 62 p. 140). The referee found that respondent's handling of the cost monies "was intentional" and improper and because "he needed money" (ROR p. 39). Despite being requested to provide Dr. Hill, his client, with an accounting, respondent asserted that Ms. de Oliveira told him not to discuss anything with Dr. Hill, including expenditures made against the cost deposit. The referee indicated that respondent's position was "nonsensical and not credible" (ROR p. 39).

It is well settled that the misuse of client trust funds is one of the most serious offenses an attorney can commit. The Florida Bar v. Wolf, 930 So. 2d 574, 577 (Fla. 2006). Further accounting for client funds is a serious responsibility and this Court has imposed lengthy rehabilitative suspensions, rather than disbarment, when attorneys were grossly negligent in the management of their trust accounts. See The Florida Bar v. Mason, 826 So. 2d 985(Fla. 2002) (two year suspension) and Wolf, 930 So. 2d 574 (three year suspension). It is apparent that respondent incurred costs on behalf of his representation of Dr. Hill and Ms. de Oliveira. It is also clear that he failed to maintain the appropriate records necessary to account for how he expended the cost deposit. Respondent maintained that it was his belief that the cost deposits were his funds. At a minimum, respondent was grossly negligent in his handling of the deposit and in the accounting of the expenditures of these funds. At worst, respondent intentionally misappropriated Dr. Hill's cost deposit.

An attorney was suspended for one year in The Florida Bar v. Smith, 866 So. 2d 41 (Fla. 2004) for her negligent handling of client funds and for negligently handling two immigration cases. Like respondent, Ms. Smith was a sole practitioner with a good reputation for integrity. She also suffered from serious health problems during the time period in question. Ms. Smith deposited a filing fee received from a couple for an immigration case to her operating account rather than to her trust account. Like

respondent, she was unable to provide a "valid" explanation for her decision. One month later, her operating account contained insufficient funds to honor this obligation. Ms. Smith admitted she unintentionally used the clients' funds for her own expenses rather than applying them to the filing fee for the case. After Ms. Smith failed to handle the immigration case in a timely manner, the clients requested a refund of their filing fee. Ms. Smith took approximately five months to refund the filing fee and did so only after the clients made numerous demands to which she did not respond. Additionally, Ms. Smith neglected another immigration case. Ms. Smith's financial mismanagement was due to her sloppiness in maintaining records and the fact that she became overwhelmed as a result of a combination of her serious medical problems, the lack of support staff, overwork and general financial problems. In mitigation, she did take some remedial steps to address some of her problems, but the referee expressed concern about her pattern of excuse-making and blame-shifting.

In The Florida Bar v. Krasnove, 697 So. 2d 1208 (Fla. 1997), an attorney was suspended for one year for mishandling a client's settlement funds. Mr. Krasnove received a check on behalf of his client in a products liability case. Like respondent, Mr. Krasnove deposited the funds to his personal account rather than to his trust account. After paying his client the funds she was due, he continued holding, in his personal account, the funds due to medical providers while attempting to negotiate

lower bills. His nonlawyer employee, however, failed to contact the medical providers. In the meantime, Mr. Krasnove negligently used the funds for his own purposes. Eventually, he paid the medical providers after the matter was brought to the bar's attention. Mr. Krasnove failed to maintain the minimum required trust accounting records necessary to account for the client's settlement funds. In aggravation, Mr. Krasnove, unlike respondent, had a prior disciplinary history. Similar to respondent, however, there were multiple offenses and he was an experienced attorney. In mitigation, Mr. Krasnove made full restitution, fully cooperated with the bar's investigation, had a good reputation and was remorseful.

There is no question that respondent's misconduct warrants suspension. Standard 4.62 calls for a suspension when a lawyer knowingly deceives a client, and causes injury or potential injury to a client. Standard 6.12 calls for a suspension when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action. Standard 6.22 calls for a suspension when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. Standard 7.2 calls for a suspension when a lawyer knowingly engages in conduct that is a violation of a duty

owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The Florida Standards for Imposing Lawyer Sanctions do not differentiate between a suspension with automatic reinstatement and one requiring proof of rehabilitation. It is the aggravating factors that tip the scale in favor of a suspension requiring proof of rehabilitation prior to a disciplined attorney's reinstatement to the practice of law. Herein, respondent had a dishonest or selfish motive both in inducing Dr. Hill and Ms. de Oliveira to hire him and in frustrating Dr. Hill's discovery efforts in the resulting malpractice suit [Florida Standard for Imposing Lawyer Sanctions 9.22(b)]. Further, respondent's cumulative misconduct is considered as an enhancing factor for discipline. Under Standard 9.22(c), there was a pattern of misconduct with respect to respondent's repeated failure to comply with discovery requests and his failure to comply with the court's order which ultimately resulted in the court sanctioning respondent. In addition, the evidence supports Standard 9.22(d), as respondent committed and was found guilty by the referee of multiple offenses. It is without question that, as an illegal immigrant, Ms. de Oliveira was in a precarious situation and totally dependent upon her attorney. She clearly was vulnerable within the dictates of Standard 9.22 (h). Lastly, respondent was admitted to The Florida Bar in 1996 and had been practicing law about eight years at the time he was hired to

represent Dr. Hill and Ms. de Oliveira [Standard 9.22(i)]. During his deposition on January 27, 2006 in the malpractice case, respondent testified that 70% of his law practice was immigration law (B-Ex. 1 Tab 62 pp. 33-34). Respondent also testified during this deposition that he was aware the Florida Rules of Civil Procedure required him to respond to a production request within 30 days (B-Ex. 1 Tab 62 p. 100). Therefore, despite his position that he was not experienced with civil litigation at the time in question (T Vol. IV pp. 550, 596), respondent admittedly understood the discovery deadlines in the procedural rules. He however chose to ignore the rules in order to protect his legal position without concern to the duties he owed to the judicial system and the legal profession.

"The integrity of the individual lawyer is the heart and soul of our adversary system. In the ultimate analysis, our system depends on the integrity, honesty, moral soundness, and uprightness of the lawyer. That integrity must be above reproach. There can be no breach or compromise in that essential quality of an officer of the court without seriously undermining our entire adversary system." The Florida Bar v. Rood, 569 So. 2d 750, 753 (Fla. 1990), dissenting opinion of Justice Ehrlich. The bar submits that like the attorney in Rood, respondent, at the times in question, exhibited an absence of the essential qualities that are the sine qua non of an officer of the court.

Respondent's misconduct is deserving of a rehabilitative suspension based upon the applicable case law and standards.

ISSUE II

IT WAS AN ABUSE OF DISCRETION NOT TO AWARD THE BAR ITS FULL COSTS IN THIS MATTER WHERE THE BAR PREVAILED AND ALL OF THE COSTS WERE PERMITTED BY THE RULES

The bar incurred $18,058.43 in costs in successfully prosecuting this disciplinary matter. After respondent filed a motion objecting to some of the bar's costs, the referee declined to award the bar $3,170.80 of its total costs. Pursuant to rule 3-7.6(q)(3), the referee may assess the bar's costs against an accused attorney when the bar is successful either in whole or in part. In respondent's case, the referee recommended respondent be found guilty of violating 10 of the 13 rules alleged in the bar's Complaint and all of the costs set forth in the bar's statement of costs were ones specifically permitted by rule 3-7.6(q)(3). The referee did not specify in his report what cost items he was declining to assess against respondent or the reasons for his decision. It, however, appears the referee reduced the bar's expert witness costs by $2,560.00 and declined to award the bar its investigative costs in the amount of $609.14. The bar submits that the referee abused his discretion by discounting the costs incurred by the bar in the disciplinary matter as there was no showing that said costs were unnecessary, excessive or improperly authenticated.

The assessment of costs in a disciplinary proceeding is within the referee's discretion and, absent a clear showing of an abuse of that discretion, the referee's award of disciplinary costs shall not be reversed. The Florida Bar v. Head, 27 So. 3d 1, 10 (Fla. 2010). This Court, however, has the final discretionary authority to award costs and it may consider whether an expense is reasonable and award or refuse to award a particular cost as sound discretion dictates. The Florida Bar v. Martinez-Genova, 959 So. 2d 241, 249 (Fla. 2007), The Florida Bar v. Bosse, 609 So. 2d 1320, 1322 (Fla. 1992), The Florida Bar v. Davis, 419 So. 2d 325, 328 (Fla. 1982).

This Court long has held that ethical members of The Florida Bar who have not engaged in professional misconduct should not unnecessarily bear the cost of prosecuting the misdeeds of unethical members of the bar. Dove, 985 So. 2d 1011 ; The Florida Bar v. Gold, 526 So. 2d 51, 52 (Fla. 1988). As respondent violated the rules and brought the expense of this disciplinary proceeding upon himself, the membership of the bar should not bear any portion of the costs incurred in this disciplinary proceeding.

On July 5, 2012, respondent filed his objection to three cost items: expert witness costs, bar staff investigator costs, and bar counsels' out of pocket costs for traveling to attend Dr. Hill's deposition. All of the costs listed by the bar in its Statement of Costs, Amended Statement of Costs and Second Amended Statement of

Costs were permitted under the provisions set forth in R. Regulating Fla. Bar 3-7.6(q). Moreover rule 3-7.6(q) does not require the bar to include ledgers, receipts, cancelled checks or invoices when filing the Statement of Costs. The costs to which respondent objected, and the referee declined to award to the bar, were permitted under rule 3-7.6(q) and all were reasonably incurred in connection with the bar's investigation and prosecution of this matter. Were it not for respondent's misconduct, none of the costs would have been incurred by the bar. As a result, the referee's failure to tax these costs against respondent was an abuse of discretion. Gold, 526 So. 2d at 52. Respondent failed to provide any evidence that the costs were unnecessary, excessive, or unable to be separated between proven and unproven charges. The Florida Bar v. Kassier, 730 So. 2d 1273, 1276 (Fla. 1998). But for respondent's misconduct, there would have been no disciplinary action filed against him and, therefore, no costs.

Expert witness costs are permitted in bar disciplinary proceedings. The Florida Bar v. Bosse, 689 So. 2d 268 (Fla. 1997). Herein, the bar utilized an expert witness experienced in immigration law, a highly specialized area of law. The nature of the allegations against respondent concerned his handling of Dr. Hill and Ms. de Oliveira's immigration matter and necessitated the retention of an expert to address the reasonableness of respondent's actions and the competency of his representation. The expert is entitled to be paid, whether by the respondent or the bar, for the work

performed in anticipation of testifying and for appearing at the final hearing. Because the final hearing was held over a period of several days, rather than merely one day, the best use of judicial economy dictated that there be some overlap of when witnesses were requested to appear for their testimony. Herein, the bar's expert appeared to testify the afternoon of June 12, 2012. Due to the length of time of cross examination of the bar's first witness, the expert was excused until June 14, 2012.

Respondent objected to the expert charging for her appearance on the afternoon of June 12, 2012 and for her legal assistant to summarize respondent's deposition (Bar Ex 1 Tab 62). As an expert, the bar could have had its expert sit in on all of the witnesses' testimony. Respondent's misconduct gave rise to the expert witness costs. It would be an abuse of discretion to penalize the general bar membership for respondent's misconduct by reducing the expert witness fees to better suit respondent's beliefs about how the bar should have presented its case. Further, penalizing the bar for the expert's use of a legal assistant to summarize a 344 page deposition is unreasonable. Such use of a legal assistant was cost effective as the expert could have done such herself at a higher cost. The fact that respondent only had a few documents relating to his representation of Dr. Hill and Ms. de Oliveira, in part, necessitated the expert reviewing respondent's deposition to properly assess matters such as the reasonableness of his actions and the competence of his representation.

In The Florida Bar v. Golden, 502 So. 2d 891 (Fla. 1987), the accused attorney argued that the bar was not entitled to recover the witness fees and expenses of the complaining witness because the witness testified at the final hearing without having been subpoenaed. The rule in effect at the time, Integration Rule 11.06(9)(a), provided for the bar to recover witness fees and traveling expenses. There was no requirement that a witness be subpoenaed in order for the costs to be taxable. Likewise, the current rule concerning witness costs does not contain any limiting language with respect to those costs, such as requiring the witness be under subpoena or that only the costs associated with the day on which the witness actually testifies be recoverable.

Bar staff investigator costs are also properly taxable under rule 3-7.6(q). Respondent objected to investigator costs that consisted of .4 hours at $26.00 per hour and 20.4 hours at $29.00 per hour. Respondent should not be allowed to dictate how the bar investigates a matter. Approximately 21 hours of investigation was not unreasonable due to the seriousness of the misconduct alleged and for which the respondent was found guilty. The bar's investigation encompassed all levels of the disciplinary process, including investigating the various allegations against respondent and interviewing witnesses (including respondent's mitigation witnesses). Further, respondent failed to show that said costs were unreasonable, unnecessary, excessive or improperly authenticated.

In The Florida Bar v. Kyle, 530 So. 2d 918 (Fla. 1988), the accused attorney objected to the amount claimed on the bar's statement of costs for the hourly compensation and travel expenses of the bar's staff auditor in connection with the investigation of the accused attorney's trust account transactions. The referee found that the audit was justified and that the costs were reasonable and taxable against the accused attorney. This Court agreed. Similarly, the bar's investigative costs were reasonably incurred in connection with the bar's investigation of the allegations against respondent and in connection with interviewing the witnesses he listed in mitigation. Investigative costs are permitted under the Rules Regulating The Florida Bar and, therefore, it was an abuse of discretion not to award this cost to the bar.

In The Florida Bar v. Carson, 737 So. 2d 1069, 1073 (Fla. 1999), the accused attorney argued, without success, that the bar's costs assessed against him were excessive and were not properly authenticated. This Court found no merit in his argument as to the appropriateness of the costs because all were taxable under former rule 3-7.6(o)(1). Where the choice is between imposing costs on an attorney who has violated the Rules Regulating The Florida Bar and imposing them on the membership of the bar, it is only fair to tax the costs against the attorney who has been found guilty of professional misconduct. Kassier, 730 So. 2d at 1276.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's recommendation of the ninety day suspension without proof of rehabilitation and payment of $14,887.62 of the bar's total $18,058.43 in costs and instead impose a one year suspension with proof of rehabilitation prior to reinstatement and payment of the bar's total costs in this matter in the amount of $18,058.43.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U. S. Mail to the Respondent's Counsel, Kevin P. Tynan, at Richardson & Tynan, P. L. C., 8142 North University Drive, Tamarac, Florida 33321-1708 and via electronic mail at ktynan@rtlawoffice.com; and a copy of the foregoing has been furnished by regular U. S. Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 and via electronic mail at kmarvin@flabar.org, this 4th day of October, 2012.

Respectfully submitted,

_____

Frances R. Brown-Lewis, Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses.

_____

Frances R. Brown-Lewis, Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC11-1135

v.

TFB File No. 2007-50,202(09C)

MAX RICARDO WHITNEY,

Respondent.
_____/

APPENDIX TO THE FLORIDA BAR'S INITIAL BRIEF

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